IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 167.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY ET AL., APPELLANTS,

vs.

W. N. COLER & COMPANY.

SUPPLEMENTAL BRIEF FOR THE APPELLANTS.

The ruling of the supreme court of North Carolina construing article 2, section 14, of the constitution has been sustained by the circuit court of appeals in Board of Commissioners *vs.* Coler, 96 Fed. Rep., 284, and in Board of Commissioners *vs.* Union Bank, 96 Fed. Rep., 293, and Judge Simonton in the circuit court, and follows the construction by the supreme court of Illinois of almost identical language.

Supervisors *vs.* Post, 94 U. S., 260.

Post *vs.* Supervisors, 105 U. S., 667–671.

The supreme court of North Carolina declared, before the bonds in controversy were issued, on October 1, 1889, that "when the constitution prescribes and directs, in terms or by necessary implication, that a *particular power shall be exercised in a specified way*, or a particular thing done *by a particular co-ordinate branch of the government* (*as the legislature*) or by a particular officer or class of *officers, and prescribes* the way and manner *of doing it, such direction cannot be disregarded.* * * * *Such direction must be treated as a command and an observance of it essential to the effectiveness of the act or thing to be done.*"

State *vs.* Patterson, 98 N. C., 660 (decided in 1887, two years before issue of bonds on October 1, 1889).

The first decision in which article 2, section 14, of the constitution was construed was Bank *vs.* Commissioners, 119 N. C. Rep., 214.

The validity of the Wilkes County bonds and of the Buncombe County bonds was passed on at the same session of the court in the cases of—

Commissioners *vs.* Call, 123 N. C., 308.

Commissioners *vs.* Payne, 123 N. C., 432.

The decisions claimed by appellees to be inconsistent with the construction given by the court to article 2, section 14, are reviewed by Justice Clark in the opinion in Bank *vs.* Commissioners, 119 N. C., at pages 220 to 223, and Judge Goff, from the court of appeals, in 96 Fed. Rep., at page 290, where he says that the contention of the appellees was not sustained by an analytical examination of the cases referred to. A critical review will show the adjudications of the

State court, *upon a consideration* of the point involved in each case, fall under three classes:

1st. Where the statute upon its face showed that the command of the constitution had been disregarded, as by a failure to incorporate the prescribed enacting clause or the failure of the presiding officers of the two legislative houses to sign acts.

State *vs.* Patterson, 98 N. C., 660, 662, 664.
Scarboro *vs.* Robinson, 81 N. C., 409.

2d. Where there is a command or prohibition as to legislative proceedings contained in the constitution and no means provided in that instrument or by statute for preserving the evidence as to its observance or in reference to the requirement that notice shall be given of the introduction of a private act, without any provision for preserving evidence of the publication or in reference to the requirement that bills generally should be read three times, without providing, as in the enactments mentioned in article 2, section 14, that the vote should be recorded in the journals, where the doctrine *omnia presumuntur* is applied by the court.

Gatlin *vs.* Yarboro, 78 N. C., 119.
Carr *vs.* Coke, 116 N. C., 223.

3d. Where there is a command or a prohibition to do or not to do a thing and a requirement that the evidence of the proceeding shall be preserved in a particular case, as in that at bar.

Another case relied on by appellees to show inconsistent ruling is the first decision in Bank *vs.* Com'rs, 116 N. C.,

where the journals had not been offered in evidence below, as they were on the trial, giving rise to the appeal in 119 N. C., 224. In a similar case the court said:

"Nor is it of any importance that the act of 1857 had been assumed to be an existing law * * * for in each of these cases the validity of the statute was not controverted."

Post *vs.* Supervisors, 105 U. S., at p. 669.

Neither of the three amendments, act of August 11, 1868, act of February 20, 1879, and act of March 2, 1881, was passed in accordance with the requirements of article 2, section 14. (See printed Record, from bottom of page 34 to the middle of page 41, and agreement of counsel on page 34.)

The contention that the act of 1879 was passed regularly appears groundless by a reference to the record of the second reading (on page 35 of the printed record), where it appears that "as amended, the bill passed its second reading" without a recording of the vote by yeas and nays.

On the same page is the record that the bill was taken up on its third reading, and on the next page the vote on the third reading is given. It appears that the secretary of state certified that the extracts were full, but if that were not so counsel argued (Record, p. 34) that the extracts "presented a correct history of legislative action."

Appellants contend that the Second division, from Salem-Winston to Wilkesboro, was a railroad created in contemplation of the rulings in North Carolina by the act of February 20, 1879.

The original charter (section 1, page 24 of the record) for constructing a railroad with one or more tracks *from*

some point on the *North Carolina railroad between the town of Greensboro and the town of Lexington*, in Davidson county, to some *point on the northwestern boundary of the State to be hereafter determined*," in section 13 (page 27) * * * provides that the company shall have power to construct branches of said road, one of which shall run from the towns of *Winston and Salem by way* of Mt. Airy. This branch has been built, as shown on the map, to Mt. Airy from Winston-Salem, on the main line, but the point of intersection of the main line with the northwestern boundary of the State has never been determined, and the main line has never been built beyond Salem-Winston.

The second division cannot be called the main line, because its termini were absolutely fixed within the State by the act of February 20, 1879. That was not a statute fixing the northwestern terminus of the main line, but creating a new division with a different terminus.

Section 13 of the original charter is amended in act of 1879, section 1 (page 29 of the record), by adding the words "and one of which shall be constructed from the towns of Winston and Salem *up the valley of the Yadkin, by way of Jonesville and Wilkesboro*, in the county of Wilkes, to Patterson's factory, in the county of Caldwell, which branch shall be known as the Second division."

Suppose the act had provided that one line, to be known as the Second division, should be run from Salem-Winston, by way of Lincolnton, to the South Carolina line in the direction of Spartanburg, South Carolina, would it have been contended that this was the original line?

The supreme court of North Carolina before February 20, 1879, had held just such a line no part of the original line.

Where a charter was granted by the State of North Carolina to the Chatham railroad in 1861, and was amended by ordinances of the convention in 1862, and finally by the legislature in 1868, which last amendment authorized the building of a branch in the direction of Cheraw, on the South Carolina line, the court held that this branch was not an unfinished road on the 24th of April, 1868, when the constitution was ratified, though work had been before done on the original line.

Galloway *vs.* Railroad, 63 N. C., 147, 155, 157.

In the leading opinion in Galloway *vs.* Railroad, *supra*, Chief Justice Pearson said, in reference to this Cheraw branch:

"An unfinished road is one that has been begun and partly worked on, and such a road is made an exception (under article V, section 4, of the constitution) on the ground that it might be proper to finish it, in order to prevent a sacrifice of the work that has been done. There is no evidence that such was the fact in regard to this road."

Justice Rodman, concurring, in the same case, said:

"The Chatham railroad, *between the termini and the route established by previous legislation* was an unfinished road in the legislative meaning of the phrase; but the road which *was to start from one of the termini of the Chatham road, or from some point on it, and thence run to Cheraw, was a road which was unfinished in the sense that it had never been begun*, but not in the sense contemplated by the constitution, which meant only to include those roads which *had been begun, but*

were unfinished at its adoption. We are obliged to give this meaning *to that phrase in the constitution, as any other construction would render it totally ineffective, and defeat any policy which it may be supposed it was* intended to enforce."

A branch which was located as beginning "at one of *the termini* of the *Chatham road* or *from some point on it*," was not so far a part of the main line of the Chatham road as to make it an unfinished road at the adoption of the constitution on April 24, 1868, within the requirement of section 4, article V, of the constitution, and to authorize the State to take stock in it or lend it aid.

If that branch was a distinct and separate road, not a part of a main unfinished line, how could the act of 1879, locating this second line and calling it a branch, constitute it a part of the line from Greensboro to Salem-Winston, and thereby give it the advantages of a part of the line unfinished when the constitution was ratified?

The pertinent portion of article V, section 4, is as follows:

"The General Assembly shall have no power to give or lend the credit of the State in aid of any person, association or corporation, except to aid in the completion of such railroad as may be unfinished at the time of the adoption of this constitution or in which the State has a direct pecuniary interest."

This authority will apply with still greater force (as will be presently shown) in determining whether this branch was when the act of 1868–1869 (which appears in the record, at page 28, as a part of the code re-enacted in 1883) was ratified on the -- day of ——, 1869, by the legislature elected in 1868.

If the act of 1879, *like the Cheraw act in* 1868, *created a new line, then the power to build it was conferred first on the* 20*th of February*, 1879, *and the authority to counties to subscribe therein first attempted to be given* was insufficient *and invalid because of the failure to call and record the yeas and nays on the second reading of the bill in the house of representatives* (see Record, page 35, for proceedings of the legislature and the agreement of counsel, at page 34, it having been agreed that the printed extracts presented "a correct history of legislative action," &c.).

The bonds contain the following recital:

"This bond is one of a series of one hundred bonds of the denomination of one thousand dollars each, issued by authority of an act of the General Assembly of North Carolina, ratified the 20th day of February, A. D. 1879, entitled 'An act,'" &c. (giving title of the act as already quoted).

Counsel for the railroad company and for the county evidently thought the act of 1879 was then the only valid authority, having failed to examine the journals.

The court, in Commissioners *vs.* Call, *supra*, held that this recital operated as an estoppel under the law of the State as interpreted by that court.

Whether the recital operated as an estoppel or not, and even if the act of 1879 did not create a new line and confine counties on that line to a claim of authority under it, there was, nevertheless, no power vested in Wilkes county on October 1, 1889, by any other known legislation, to create a bonded debt to pay a subscription for stock of the railroad company.

In Commissioners *vs.* Payne, 123 N. C., at page 188, the

court, in discussing the power of Buncombe county to issue certain bonds in aid of a railroad, said:

"*A general act authorizing any and all counties to issue bonds for railroad purposes would be void*, especially when (as in the case here) it is necessary to exceed the constitutional limit to pay principal and interest."

The court manifestly did not agree *with the learned counsel, Judge Dillon, that the inhibition upon the legislature extended only to cases where the constitutional limit of taxation should be exceeded, but did say that such a general law would be still more obnoxious where it appeared that the limit would be exceeded.* The evident meaning of the court was that, whether the proposed tax would exceed the constitutional limit or not, the statute authorizing it would come within the constitutional inhibition of section 7, article V, which provides that—

"*Every act of the General Assembly levying a special tax shall state the special object to which it shall be applied*," &c.

But when the law passed should provide for a tax in excess of such limitation it would come *in conflict also and especially* with the provisions of article V, section 6, that the tax levied by a county "*shall never exceed the double of the State tax except for a special purpose and with the special approval of the General Assembly.*"

In Commissioners *vs.* Call, 123 N. C., 312, 318, involving the validity of the very bonds in controversy in the case at bar, Justice Douglass said of the power claimed to have been given in the original charter:

"That said ordinance cannot be relied on to support the validity of the bonds is apparent, for several reasons: First,

We do not see that any authority whatever is given or attempted to be given to Wilkes county to subscribe to the capital stock of this company."

All of the acts purporting to vest authority in counties to subscribe are general.

First. The Authority of the Ordinance.

The authority contained in the ordinance is as follows:

Sec. 12. * * * (See Record, page 27.) "And that *all counties* or *towns subscribing stock* to said company shall do so in the same *manner* and *under the same rules, regulations* and *restrictions as are set forth and prescribed in the act incorporating the North Carolina and Atlantic Railroad Company, for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company.*"

All powers to corporations are to be construed strictly. Let us be mindful of that rule. Who are the donees of the power in the ordinance? The answer must be, "*All counties and towns subscribing stock to said company.*"

As was mentioned by the court in the opinion in Commissioners *vs.* Call, *supra*, the reference for the mode of proceeding on the part of a county is to the charter of the "North Carolina and *Atlantic Railroad Company.*"

No such company existed in North Carolina at the time, and counsel have offered in this case, as was done without attracting the attention of the court in Bido *vs.* Commissioners of Forsyth County, the charter of the Atlantic and North Carolina Railroad Company. This will appear by reference

to chapter 136, Laws of 1852, and comparing sections 33 *et seq.* with the exhibit on page 31 of the record.

The sections of the Atlantic and North Carolina charter relied upon provide—

"That it shall be lawful for any incorporated town or *county near or through which said railroad may pass to subscribe for such amount of stock in said company* as they shall be authorized to do by the *inhabitants* of said town or *the citizens of said county.*" (See Record, page 31.)

The framers of the constitution of 1868 clearly intended to safeguard the interests of counties by having the attention of legislators called sharply to any proposition to levy a tax upon counties represented by them. The object aimed at in article V, section 7, was to have every bill providing for the levy of a tax to so state the *special purpose* as to direct the attention of legislators to the locality where it was to operate, to make it "local" as well as "special." Another object was in consonance with the common-law idea, to identify the donee of the power attempted to be vested.

The claim of appellees is that they can describe a circle with a ~~radius~~ radius not reaching outside of the State, with Winston as a center, build branches from center to circumference on any line, and call on counties "at or near" any such line to subscribe.

It is difficult to conceive of a more general grant of power than one claimed for all of the counties at or near all of such possible branches. How could a representative of the people determine what the courts would hold "near" to mean in this connection? How could he determine under such gen-

eral grant of authority whether he was vesting power in his own constituents to create a debt?

The decisions of the supreme court of North Carolina on October 1, 1889, had established the rule that a statute levying a tax must be special as well as local, when the intention was to enforce it against particular subdivisions of the State.

In Barksdale *vs.* Commissioners, 93 N. C., 472, 475, decided at the October term, 1885, the court said:

"This form of taxation is *local* as well as *special*, and such has been the legislative interpretation of this clause in the frequent cases in which a special approval has been asked and obtained."

Broadnax *vs.* Grove, 64 N. C., 244.
Simmons *vs.* Wilson, 66 N. C., 236.
Mouney *vs.* Commissioners, 71 N. C., 486.
Trull *vs.* Commissioners, 72 N. C., 388.
French *vs.* Commissioners, 74 N. C., 692.
Cromantic *vs.* Commissioners, 87 N. C., 134.
Barksdale *vs.* Commissioners, *supra*, follows Broadnax *vs.* Groom, 64 N. C., 244.

In Broadnax *vs.* Groom the court was construing "an act to authorize the commissioners of *Rockingham county to levy a special tax* for the purpose of building and repairing bridges in said county, and two questions were decided:

1st. That the act was constitutional.

2d. That the cost of building bridges was a necessary expense, and the county authorities were authorized by law to determine the amount.

DEFINITION OF A SPECIAL FRANCHISE.

The court said:

"There is a special purpose, to wit, building and repairing bridges *in the county* of Rockingham."

The other question, whether when the journals were silent the presumption *omnia presumuntur* would apply, was directly settled in Gatlin *vs.* Tarboro, 78 N. C., 119, 123.

All of the cases cited by Chief Justice Smith in Barksdale *vs.* Commissioners show that in section 7, article 2, there is a legislative command, to wit, "Every act of the General Assembly *shall state the special object.*"

Under the rule held in State *vs.* Patterson, *supra*, obedience to this command was essential and its disregard fatal to the validity of the act.

In Barksdale case the language "except for a special purpose" was construed to require that the act should name the particular municipality—be "local" in its nature—as well as to mention the special purpose, and this was declared to have been the uniform legislative interpretation.

The command to state the special object on the statute must be obeyed.

State *vs.* Patterson, 98 N. C., 660, 662, 664.

If there is no difference between a "special purpose" and a "special object" (and we submit there is none), then it follows that a general act which does not so far define the object as to indicate the particular locality to be affected is

void for failure to comply with an "essential" requirement of the constitution.

The act of 1869 (the Code, sections 1996 to 2000) is also a general act, as held in Commissioners *vs.* Call, *supra* (see Record, page 28):

"SEC. 1996. The *boards of commissioners of the several counties shall have power to subscribe stock to any railroad company*," &c. * * *

"SEC. 1999. In case the county shall subscribe the amount proposed in bonds the board of commissioners shall have power to fix the rate of interest.

* * * * * * *

"SEC. 2000. The taxes authorized by the three preceding sections to be reserved for the payment of interest and principal shall be collected by the sheriff in like manner as other State taxes," &c.

The act declared insufficient authority in Barksdale *vs.* Commissioners, *supra*, contains substantially the same provisions as the code.

The pertinent portion of section 23, chapter 174, Laws of 1885, is as follows:

"Then the *board of commissioners of each county shall levy* annually a special tax to supply the deficiency for the support and maintenance of said schools for the said period of four months or more."

It is manifest that the authority purporting to be given by the act of 1869 (the Code, sections 1996 to 2000) is general, and as an enabling act that statute is insufficient for the reasons already stated.

SUMMARY OF DEFECTS OF ENABLING ACTS RELIED ON.

1st. The three legislative amendments to the charter are void under article 2, section 14, of the constitution.

2d. The original charter ought to be construed alone, because the acts of 1852, chapter 136, contain the charter of the "*Atlantic and North Carolina Railroad Company*," while the reference in the original charter is to the "act to incorporate the *North Carolina and Atlantic Company*." (See opinion in Commissioners *vs.* Call.) The fact that this radical mistake was not noticed in Hilo *vs.* Commissioners does not cure it.

3d. If the reference incorporates the sections, as claimed, still there is no statement of a "special object," but an attempt to confer authority to run branches to every county in the State and authorize every county "on or near" any line located to subscribe.

The majority of the court as well as the minority in Commissioners *vs.* Call, 123 N. C., *supra*, said the subscription was made and the bonds were issued before the adoption of the constitution, on April 24, 1868.

Justice Douglass, in the leading opinion, cites Norton *vs.* Brownsville, after the statement that such was the fact, and Justice Furches, in the dissenting opinion, at page 330, says:

"*But this* charter was framed, the *subscription was made and the bonds were issued before the adoption of the constitution of 1868*, which did not go into effect till the 22d of April of that year."

The appellants were justified in concluding, as the court may conclude, the court in North Carolina as now constituted, having the right to review the full original records in "the Hill and Bilo cases," had stated the facts correctly, whether or not that statement conflicted with what may have been an incorrect statement made in the opinion in the first and perpetuated in the second of said cases. *It would seem that no decision of this court has denied to the highest State tribunal the right to determine what were the facts upon which their decisions were predicated, or has conceded the authority of the Federal courts to conclude that both the majority and minority of the court made either an incorrect statement of the facts through inadvertence or a false one.* The counsel for appellants felt warranted in following the unanimous view of the facts upon which both opinions in the State tribunal were predicated.

If the court here can conclude that the facts are as contended by counsel for appellees, nevertheless under the rulings of the court when the bonds were issued *they were not valid.*

1st. Because neither the charter of March 9, 1868, nor the act of 1869 (the Code, sections 1996 to 2000) were sufficiently specific in designating the donees of the power claimed to have been conferred.

2d. Because a reference to the charter of the "*North Carolina and Atlantic railroad,*" in section 12 of the charter (page 27 of the printed record), did not by any known rule of construction incorporate sections of the charter of the "*Atlantic and North Carolina Railroad Company*" (a totally different corporation), as will appear by reference to "chapter

136 of the Laws of North Carolina, session of 1852" (referred to on page 31 of the printed record). This radical error is referred to by the court as an evidence of the insufficiency of the power.

3d. Because, though after making such a grave mistake as to the very essence and nature of the authority relied on, the court concluded that there was sufficient authority shown in the two charters, it nevertheless appears that the act of August 11, 1868 (there being no evidence offered as to its failure to pass in the regular way), was treated as a curative act, conferring special authority *in terms on Forsyth county only.* This the court could treat as a mistake in subsequent cases when the journal was offered in the Supreme Court (see Post *vs.* Supervisors, 105 U. S., 667, 668). Correct both of these errors, as the court had the right, and it was its duty to do, and the only power remaining would be that given in section 13 of the charter, etc.: "All counties and towns subscribing to said company in the manner and under the same rules, regulations, and restrictions, prescribed by the act incorporating the North Carolina and Atlantic Railroad Company to subscribe to the capital stock of said company." *What the "rules, regulations, and restrictions"* referred to may be will only appear when the proper charter is found. Whether there was or was not such a charter does not appear, but *the mistake, if mistake it was, in the reference may account for the abortive attempt to confer power by the act of February* 20, 1879 (Printed Record, page 29), and the act of March 2, 1881 (Record, pages 30 and 31). Though the court *ex mero motu* takes no notice of a private law (Hughes *vs.* Commissioners 107 N. C., 598) where the chapter of the laws pub-

lished by authority of the State was referred to in an opinion offered in evidence or in the bill of complaint, as here, the reference to chapter 136, Laws of 1852, which showed this error, it could be corrected by the court just as the error as to the curative act may be corrected, by calling attention to the evidence offered.

It is the established practice of the supreme court of North Carolina, when a dispute arises as to the facts upon which an older decision was based, to refer to the original record of that case.

4th. The act of 1869 (the Code, sections 1996 to 2000) is also too general in its character, and the court followed the prior decision in Galloway *vs.* Commissioners, 63 N. C., *supra*, in construing it. In that case the court construed and applied the language of article V, section 4, of the constitution of North Carolina, which is as follows:

"The General Assembly shall have no power to give or lend the credit of the State to any person, association, or corporation, *except* to aid in the completion of a railroad which may be unfinished at the time of the adoption of the constitution, or in which the State has an interest."

It was held in Galloway *vs.* Railroad, *supra*, that a branch of the Chatham railroad, the construction of which was authorized by the act of 1868, amending a charter granted in 1863, was not an unfinished road when the constitution was adopted, although the original charter authorized the building of a road from Raleigh to the gulf, in Chatham county, with branches, and the amendment of 1868 (see facts stated in Galloway *vs.* Railroad) provided for a branch running from some point on the original line. The work on the orig-

inal line was held not to constitute the branch road an unfinished road within the meaning of article V, section 4.

The act of 1869 was re-enacted *in totidem verbis* in the Code, sections 1996 to 2000 (Record, page 25).

Section 3766 of the Code of North Carolina is as follows:

"When a part of a statute is amended it is not to be construed as having been repealed and re-enacted in the amended form, but the portions which are not altered are to be considered as having been the law since their enactment and the new provisions as having been enacted at the time of the amendment."

This section has been construed in the following late decisions:

Wood *vs.* Bellamy, 120 N. C., 212.

State Prison *vs.* Day, 124 N. C., 362.

Wilson *vs.* Jordan, 124 N. C., 363.

It is needless to recite the older cases cited in the three decisions last named, since it was conceded by the learned counsel that the provisions of the Code, sections 1996 to 2000, are in contemplation of law the act of 1868–1869.

The act of 1868–1869 speaks therefore as of the date of its enactment, and hence the construction given to it in Commissioners of Stanley County *vs.* Snugger, 121 N. C. Rep., 394.

The act, being a part of the reconstruction legislation giving effect to the constitution of 1868, it is not strange that the words "*in the completion of any railroad in which the citizens of the county may have an interest*" were construed as speaking of roads unfinished at the time of the passage of the act or the adoption of the constitution. *It was deemed*

a part of the policy of the State to place its subdivisions under the same restrictions as the State by preventing them from aiding in the completion of a road not then begun.

The branch from Winston-Salem to Wilkesboro was an unfinished road in the same sense that the Cheraw branch of the Chatham road—the creature of the same legislature of 1868—was. "It had not been begun" when the act of 1868–1869 was passed.

The citizens of the county could have had no peculiar interest unless it was a pecuniary interest.

Every tax-payer of the State is interested, in a sense, in the improvement and advancement of values in every part of the State. But it is evident that the legislature intended to refer to some peculiar interest at the time of the passage of the act. Besides, the words *ex vi termini* meant pecuniary interest in the connection in which they were used. (See authorities cited at page 36 of appellants' former brief.)

In examining the question of the power to issue bonds, courts generally lean neither to the tax-payer nor to the bondholder. But the Federal courts when the question of the correctness of the ruling of a State court "is balanced with doubt" will follow it.

Burgess *vs.* Seligman, 107 U. S., 20.

Forsyth *vs.* Hammond, 166 U. S., 518, 619, 620.

THERE WAS NECESSITY FOR NEW LEGISLATION, AND THE NEW LEGISLATION WAS VOID UNLESS ENACTED UNDER ARTICLE 2, SECTION 14.

If there was no authority except the very words of section 13 of the charter, new legislation was needed and required by section 7, article 7, of the constitution. When once the necessity for new legislation was admitted in order to invest the county with authority, it followed that such legislation must be passed in pursuance of the requirements of the new State constitution. *This case is to be distinguished from Norton vs. Brownsville, supra, in that the constitution of Tennessee contained no requirement as to the manner of enacting such laws.*

THE MISSOURI CASES.

The Missouri cases referred to by counsel for appellees were decisions following the settled rulings of the highest court of that State, not a construction by the Federal court of its laws, and we invoke the same principle to sustain our contention in the case at bar.

See County of Calloway *vs.* Foster, 93 U. S., 567, 570.
County of Thomas *vs.* Nicolay, 95 U. S., 619, 625.

THE STATEMENT OF COUNSEL THAT THE TAX-PAYERS DO NOT OBJECT TO PAYING THESE BONDS NOT CORRECT.

Counsel for appellants do not propose to meet these statements by simple denials; but they refer to the public laws of North Carolina, under which the personnel of a town government changes by popular election every year, and that

of the counties every two years, and yet this litigation, as appears from the decisions referred to, has been kept up during three terms of the officials of the three counties litigating and many successive terms of the officers of the town of Oxford. If the litigation had not met public approval, the new officials would have put an end to it.

The gratuitous statement that there was collusion it is not necessary to answer (Adams Ex. Co. *vs.* Ohio State Auditor, 165 U. S., 194); but this charge has been met and refuted in every court into which those controversies have been carried. In this particular case it appeared that Messrs. Battle & Mordecai, counsel for the defendant in Commissioners *vs.* Payne at the very same term, argued ably for the defendants all of the points involved in Commissioners *vs.* Call, and hence no brief was filed for Turner and Welborn.

The Mistake in the Copy of the Opinion Sent Up in Case of Turner vs. Commissioners of Wilkes.

A reference to the Southeastern Reporter of proper date will show that the opinion of Justice Douglass had been published in that law journal before the case of Turner *vs.* Commissioners of Wilkes was heard here. It may well be assumed that counsel for the plaintiff in error assumed, as did opposing counsel, that the clerk would send up a correct copy, and therefore failed to read that part of the record. An affidavit of the clerk of the supreme court of North Carolina, on file in this case at Richmond, shows the mistake was his. It does appear from the act of 1879, chapter 43 (Record, page 29), that the charter required that the line should pass Wilkesboro, south of the Yadkin. It appears

from the agreement and admission here of counsel that the road was built only to North Wilkesboro, a mile north of that river, and that in 1893 J. M. Turner, E. Wallace, and others brought an action to compel the company by mandamus to carry out that contract, but submitted to nonsuit, at fall term, 1893, because the officers of the county had already issued and delivered the bonds (see agreement of counsel near bottom of page 33 of printed record), so that the tax-payers were not quietly submitting between 1889 and 1897, when a new county government presumably responded to the popular protest.

The supreme court of North Carolina decided in 1887 that a general act was invalid as authority for levying a tax, and that the defect destroyed the efficacy of an enabling act. This decision cited older ones, which it followed. A strict construction of the command contained in article V, section 7, made both the charter, in any view of its provisions, and the act of 1869, re-enacted in the code, void for failure to follow its requirements. The three amendatory acts were all void on account of the manner of their enactment.

NOTICE TO PURCHASERS OF BONDS OF DEFECTIVE POWER.

Every purchaser of a bond had constructive notice of the defect of power under the rulings in Broadnax *vs.* Groom, Barksdale *vs.* Commissioners, *supra*, and State *vs.* Patterson, *supra*, previously made, and no recitals could cure such inherent defect of power.

THE STRANGE RESULT THAT WOULD FOLLOW FROM A CONFLICT OF OPINION IN TWO JURISDICTIONS IN THIS CASE.

Turner and another, the holders of a single one of the bonds in controversy, have already brought up the case of Commissioners *vs.* Call, by writ of error to this court, and it has been held that they are concluded by the judgment in that case. So another well-known holder of eight thousand dollars in these bonds, who is a resident of the State of North Carolina, could not recover, and would be driven to the necessity of selling, at a sacrifice perhaps, to some non-resident. On the other hand, any non-resident holder of a sufficient amount in the bonds to confer jurisdiction on the Federal court would be entitled to enforce payment. It would seem desirable to resolve many doubts in favor of the State decision before bringing about such an unfortunate want of harmony.

A. C. AVERY,
Counsel for Appellants.

No. 1494
19497
FEB 5 190
JAMES H. McKENNEY
Clerk

UNITED STATES OF AMERICA,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

versus

W. N. COLAR & COMPANY, *Appellees*.

To the Honorable the Supreme Court of the United States:

The petition of the Board of Commissioners of the Town of Oxford, N. C., respectfully showeth:

1st. That at May Term, 1899, of the Circuit Court of Appeals of the United States for the Fourth Circuit, a judgment was rendered in the case of The Board of Commissioners of the Town of Oxford, N. C., plaintiffs in error, against The Union Bank of Richmond, Va., defendant in error, whereby the judgment of the lower Court was reversed; subsequently a petition to rehear said cause was presented to the said Court, and an order was made certifying to this Court for its opinion the above entitled case of The Board of Commissioners of Wilkes County against W. N. Colar & Company, and directing that further proceedings be stayed in the case of The Board of Commissioners of Oxford against The Union Bank of Richmond till the decision of this Honorable Court.

2d. That the question arising under the Constitution of North Carolina in both of said cases is the same, and as the decision of said question by this Honorable Court will probably end the controversy between the parties, your petitioners respectfully pray to be heard through their counsel.

Wherefore they respectfully pray the Court that they may be heard on the argument of this case and that the time may be enlarged to that end.

Your petitioners will forever pray.

R. O. BURTON,
Attorney for Petitioners.

I do not mean to say the town has no other defence. It has o
defences, which will be insisted on.

Feb. 1,1900. R.O.Burton, Att

UNITED STATES OF AMERICA,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

THE BOARD OF COMMISSIONERS OF WILKES COUNTY AND OTHERS, *Appellants*,

versus

W. N. COLAR & COMPANY, *Appellees*.

To A. C. Avery, Esq., Attorney for the Appellants, and Charles Price, Esq., Attorney for the Appellees:

You are hereby notified that on Monday, February 5, 1900, or as soon thereafter as counsel can be heard, a motion based upon the foregoing petition will be made in the Supreme Court of the United States in the above-entitled action, to allow the attorney of the Board of Commissioners of the Town of Oxford to be heard, and also to extend the time therefor.

R. O. BURTON,
Attorney for the Board of Commissioners of Oxford.

JANUARY *16, 1900.*